

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

-----x

IN THE MATTER OF:

JOHN S. MAZELLA,

CASE NO. 10-23122(rdd)

Debtor.

CHAPTER 13

-----x

-----x

JOHN S. MAZELLA,

Plaintiff,

Vs.

ADV. PROC. 10-08455(rdd)

FELDSTEIN,

Defendant.

-----x

United States Bankruptcy Court

300 Quarropas Street

White Plains, New York 10601

December 12, 2013

11:37 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 Adversary Proceeding: 10-08455:

2

3 HEARING re: Motion for Summary Judgment

4 HEARING re: Cross Motion for Summary Judgment

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24 Transcribed by: Acorn Transcriptions, Inc.

25

1 A P P E A R A N C E S :

2

3 ORTIZ & ORTIZ, LLP

4 Attorneys for Debtor

5 127 Livingston Street

6 Brooklyn, New York 11201

7

8 BY: NORMA E. ORTIZ, ESQ.

9

10 STEIN, RISO, MANTEL, MCDONOUGH, LLP

11 Attorneys for Defendant Feldstein

12 The Chrysler Building

13 405 Lexington Avenue

14 New York, New York 10174

15

16 BY: EDWARD R. MINSON, ESQ.

17

18

19

20

21

22

23

24

25

JOHN S. MAZELLA

4

P R O C E E D I N G S

1
2 THE COURT: Mazella vs. Feldman -- Feldstein,
3 excuse me.

4 MS. ORTIZ: Good afternoon or good morning,
5 Your Honor, Norma Ortiz for the Debtor.

6 MR. MINSON: And Edward Minson from Stein Riso
7 Mantel McDonough for Mr. Feldstein.

8 THE COURT: Okay.

9 MS. ORTIZ: Your Honor, we made a motion, there
10 was a motion filed by Daniel O'Hara on behalf of the
11 Debtor. And Mr. O'Hara asked me to argue it, Your Honor,
12 because I am very familiar with the facts of the case.

13 THE COURT: Okay.

14 MS. ORTIZ: And --

15 THE COURT: It's a motion for summary judgment.

16 MS. ORTIZ: It was a motion for -- and it was,
17 and it was brought on in part after the last hearing,
18 Your Honor, if you recall this case is based primarily on
19 a bankruptcy stipulation and order that was signed by
20 Judge Hardin. There was a collection effort by one of
21 the creditors that was not paid pursuant to that
22 stipulation. For a couple of years in the state court
23 there were orders entered in the state court and the
24 debtor has been trying to compel Mr. Feldstein to pay
25 this last remaining debt.

JOHN S. MAZELLA

5

1 We've been before you many times, and one of
2 the primary issues that was raised on many occasions was
3 the assertion that the debtor was barred by the statute
4 of limitations because of the timing of his complaint.

5 And we've had a number of discussions and
6 papers have been filed and we have asserted, Your Honor,
7 primarily two arguments; one is that the order is binding
8 and there is no statute of limitations that bars this
9 obligation. The order is very clear. Mr. Feldstein
10 binds himself to make these payments and to reimburse Mr.
11 -- Dr. Mazella.

12 And alternatively we argue that because the
13 payments went through 2005 that if the Court were to find
14 for some reason that the order was not binding, we are
15 not barred by the statute of limitations.

16 There was a motion to dismiss our second
17 amended complaint, and Your Honor indicated in part based
18 upon the Dreier case and the theory that we had discussed
19 that the payments have gone within the six-year period.
20 You denied that motion to dismiss and based upon that we
21 made the motion for summary judgment because it's the
22 debtor's position that there really is no question of
23 fact, material fact at this point.

24 If Your Honor were to find that we're just
25 seeking to enforce an order, a final order of Judge

JOHN S. MAZELLA

6

1 Hardin, the statute of limitations doesn't come into play
2 and we could finally move towards conclusion in this
3 case.

4 And that was inspired the motion --

5 THE COURT: The summary judgment motion.

6 MS. ORTIZ: The summary judgment motion.

7 THE COURT: And there's a cross motion for
8 summary judgment also, right?

9 MR. MINSON: Yes, that is correct, Your Honor.

10 THE COURT: Okay. And you contend that the --

11 MS. ORTIZ: Well --

12 THE COURT: -- that the reliance on the 2001
13 bankruptcy order and agreement is time barred and that,
14 to the extent of the complaint relies upon the October
15 2004 settlement agreement that Mr. Feldstein is not
16 primary -- is not primarily obligated under that
17 agreement.

18 MR. MINSON: That is correct, Your Honor.

19 And I think that at the last time, I think, at
20 the hearing there was questions of fact and I don't think
21 it was so cut and dry --

22 THE COURT: Well I denied the motion to dismiss
23 because there was sufficient evidence in the record to
24 survive a motion to dismiss that there had been payments
25 by Mr. Feldstein that brought the limitations period

JOHN S. MAZELLA

7

1 under the 2001 agreement up to the date of the petition.
2 And then the complaint was filed within two years after
3 the date of the petition.

4 MR. MINSON: And Your Honor just to address
5 those issues, the 2001 stipulation, Mr. Feldstein was
6 required under that agreement to make payments to Mr.
7 Mazella in the amount of \$12,500, you know, until I think
8 they reached a number of approximately \$200,000.

9 Now he breached that agreement in 2003. At the
10 last hearing you relied on payments that were made in
11 August of 2004 before --

12 THE COURT: Up to then.

13 MR. MINSON: Up to -- yeah, there were I think
14 two or three payments made in or about July and August of
15 2004; those months, so maybe July, August, September 2004
16 in the amounts of \$7500. However, those payments were
17 not -- and then a stipulation in 2004, in October 15th,
18 was entered into -- we, our contention is that the
19 payments that were made in 2004 prior to the 2004
20 stipulation were to the Cadle Company. So they were not
21 made to Mazella. The 2001 agreement required payments be
22 made directly to Mazella of 12,500.

23 In 2004 there were some agreements, there were
24 some discussions with the Cadle Company, with Feldstein
25 and Mazella where they started to try to discuss about a

JOHN S. MAZELLA

8

1 new agreement. Even that agreement was signed in October
2 of 2004 there were payments that Feldstein made of the
3 7500 which was the number required under the 2004
4 agreement, before that 2004 agreement was executed.

5 That, we believe, does not revive the 2001
6 agreement. Those payments were made during the
7 negotiations of the 2004 agreement. So those -- and they
8 were a different amount than the 2001 agreement, and they
9 were to a different party. They were actually directly
10 to Mazella.

11 So last time I was a little bit caught off
12 guard when the discussion came because I was not aware of
13 those payments that were made in August and September,
14 because the reason why I wasn't aware of them because
15 they were not made directly to Mazella which is what they
16 were required to be made under the 2001 agreement. And
17 that is the reason we believe that those payments don't
18 all of a sudden revive the 2001 agreement.

19 MR. ORTIZ: Your Honor, if I may just say, the
20 indemnification agreement contained in the 2001 order
21 specifically provides that Mr. Feldstein will indemnify
22 and hold harmless the Mazellas.

23 If Your Honor were to find, and this is one of
24 the reasons why we made the motion, if Your Honor were to
25 find that this order is a final order of the Court, and

JOHN S. MAZELLA

9

1 there isn't a statute of limitations issue here, the
2 order is abundantly clear that this -- that Mr. Feldstein
3 is required to indemnify Mr. Mazella.

4 THE COURT: Doesn't the order just approve the
5 settlement agreement?

6 MS. ORTIZ: Yes.

7 MR. MINSON: Yes, Your Honor.

8 MS. ORTIZ: Yes, and it's a final, and it's a --

9 THE COURT: So wouldn't the settlement
10 agreement be the operative document?

11 MS. ORTIZ: I'm sorry? That's what I'm trying
12 to --

13 THE COURT: Wouldn't the settlement agreement
14 be the operative document as opposed to the order?

15 MR. MINSON: The settlement agreement is an
16 exhibit to --

17 MS. ORTIZ: It's attached.

18 MR. MINSON: -- the order.

19 MS. ORTIZ: Yeah. It incorporates that, yeah.

20 THE COURT: Right. And the order approves the
21 settlement agreement.

22 MS. ORTIZ: Yes.

23 THE COURT: So why would the, why wouldn't the
24 limitations period apply to the settlement agreement?

25 MS. ORTIZ: Why wouldn't it apply, Your Honor?

JOHN S. MAZELLA

10

1 THE COURT: Right.

2 MS. ORTIZ: Because our argument is that it's a
3 final order, it's a final order of the Court enforcing
4 the terms of this agreement. And if you don't find that
5 it would require the debtor to restart again, and the
6 debtor already went through this cause of action. That
7 is --

8 THE COURT: No, but this --

9 MR. MINSON: But Your Honor, it was a stip- --

10 THE COURT: There's a -- I don't, first of all
11 that argument I don't think is made in the motion. I
12 don't see that argument anywhere in the motion.

13 MS. ORTIZ: I believe it is, Your Honor. I
14 believe it is.

15 THE COURT: Well is there any authority for the
16 proposition that -- look, the bankruptcy code requires
17 the bankruptcy court to approve any settlement agreement.

18 MS. ORTIZ: Yes.

19 THE COURT: I don't think that -- my
20 understanding is that that does not change the statute of
21 limitations running on a breach of the settlement
22 agreement. You can't just say, oh, well because there's
23 an order it's, there's no such thing as a statute of
24 repose because the order is always there. I guess the
25 parties could do that through an order. I guess. But I

JOHN S. MAZELLA

11

1 don't see any --

2 MR. MINSON: But, Your Honor --

3 THE COURT: Let me finish.

4 MR. MINSON: Sure, I'm sorry.

5 THE COURT: I'm making your point.

6 MR. MINSON: You're right, I'm sorry.

7 THE COURT: What -- what's the authority to say
8 that an order approving the settlement agreement negates
9 any statute of limitations for breach of the settlement
10 agreement?

11 MS. ORTIZ: It was our reading, Your Honor,
12 it's our argument that the order is final in --

13 THE COURT: I know there's an argument, but --

14 MS. ORTIZ: -- terms of the --

15 THE COURT: -- there's still a limitations
16 period. I mean what, is there any case that says that?

17 MS. ORTIZ: Not completely on point, Your
18 Honor.

19 THE COURT: Is there any case even close?

20 MS. ORTIZ: We just cited that it was a final
21 order of the court.

22 THE COURT: All right. So I don't think that
23 argument's going to work.

24 MS. ORTIZ: Okay.

25 THE COURT: I do, I do think though -- I mean

JOHN S. MAZELLA

12

1 my inclination is that the Riso affirmation --

2 MS. ORTIZ: Yes, Your Honor.

3 THE COURT: -- from September 13 or September
4 14?

5 MS. ORTIZ: Yes, Your Honor.

6 THE COURT: Let me just check.

7 (Pause)

8 THE COURT: September 13, 2004.

9 MS. ORTIZ: Yes.

10 THE COURT: Is cited, and it's, you know,
11 documented on the record of course, but if it's cited in
12 the plaintiff's rule 7056 statement as the basis for
13 tolling the limitation or reviving the limitations
14 period.

15 MS. ORTIZ: Yes. Yes, Your Honor.

16 THE COURT: In paragraph 16 of that statement.
17 And the response to paragraph 16 admits that the Riso
18 affirmation acknowledged the defendant performed under
19 the 2001 bankruptcy stipulation and it paid over a
20 million one under that agreement and that defendant had
21 tendered a series of post-dated monthly checks to --
22 should be Cadle, cable company, it says in this, but
23 should be Cadle -- each in the amount of \$7500 covering
24 the period February 15, 2014 to May 15, 2015.

25 MS. ORTIZ: Yes.

JOHN S. MAZELLA

13

1 THE COURT: And refers the Court to the
2 affirmation for the facts alleged therein.

3 So I've read the affirmation again, I mean I
4 read it obviously for the June 17th hearing. So let me
5 turn to that. It's an exhibit to the motion -- the
6 debtor's motion.

7 (Pause)

8 THE COURT: And it's the affirmation of Gerard
9 A. Riso -- is he the named partner in your firm?

10 MR. MINSON: Yes, he is

11 THE COURT: Okay, all right. So it shouldn't
12 be a big surprise what he says in there.

13 Paragraph 7 --

14 MS. ORTIZ: Yes.

15 THE COURT: By the way this is dated September
16 13, 2004 before the settlement agreement.

17 MR. MINSON: But, Your Honor, it was filed
18 October 24, 2004.

19 THE COURT: It's dated September 13th and it's
20 in response or in support of Mr. Feldstein's opposition
21 to being joined as a -- to an order to show cause as a
22 party to this collection action by Cadle.

23 And paragraph 7 it says, Mr. -- and it's trying
24 to, I guess, justify that really you don't need to
25 involve us in here because we're trying to do the right

JOHN S. MAZELLA

14

1 thing. "Mr. Feldstein has in fact reached an interim
2 arrangement with plaintiff." Which this is the -- I
3 think a pretty key clause, "which he entered into
4 pursuant to his obligations to Dr. Mazella pursuant to
5 the agreement." The agreement being the 2001 settlement
6 agreement.

7 And then as acknowledged in the 7056 response
8 in front of me by Mr. Feldstein he says in paragraph 8,
9 "Mr. Feldstein has continued to make good on the post-
10 dated checks provided to plaintiff on February 11th."

11 And then if you go to page 5, paragraph 11,
12 "Mr. Feldstein has diligently attempted to meet his
13 obligations." And his obligations, as he's referring to
14 them, I believe, and this is clarified I believe in the
15 next two sentences, are his obligations under the 2001
16 agreement. He says, right after that sentence, "Mr.
17 Feldstein has diligently attempted to meet his
18 obligations." He says, "He has paid over 1.1 million
19 under the agreement."

20 MS. ORTIZ: Yes.

21 THE COURT: The agreement being the Mazella
22 agreement, the settlement agreement from 2001. "He has
23 not ignored plaintiff, paying significant sums which he
24 continues to pay." He represented this in September
25 13th, 2004 in his declaration on behalf of Feldstein.

JOHN S. MAZELLA

15

1 MS. ORTIZ: And checks were --

2 THE COURT: And then he says, "Thus if Dr.
3 Mazella believes he's entitled to additional payments
4 from Mr. Feldstein he has remedies under the confession
5 of judgment."

6 To me he's reaffirming the debt. He says I owe
7 it on behalf of Feldstein. And of course that's in
8 September, that's before the 2004 October settlement and
9 it's clearly within six years of the commencement of this
10 case which was in June of 2010, and the complaint was
11 filed within the 180 day period provided in the
12 bankruptcy code for tolling.

13 MS. ORTIZ: our Honor, I've also argued that --

14 THE COURT: So I don't see, I mean this is --
15 it's clearly the memorandum doesn't deal with this at
16 all. The memorandum, kind of amazing to me given that I
17 went through this in detail in June, simply says that the
18 payments were made under the October agreement. That's
19 completely contradicted by Mr. Riso's declaration from
20 September, and by the 7056 response which makes it clear
21 that payments were being made in July and August and
22 refers me to the Riso affidavit which says that, you
23 know, we're living up to our agreement. The agreement
24 with Mazella.

25 And that was perfectly appropriate for him to

JOHN S. MAZELLA

16

1 say it then because that agreement is an indemnification
2 agreement and, you know, he could take the view that, in
3 litigation, that yeah it's an indemnification agreement
4 and we don't have to do anything more than that. Bring
5 us in when there's a default. We're on board here.
6 We're dealing with it, and we continue to deal with it.
7 So don't include us in this state court litigation
8 between the Cadle company and Mazella.

9 I mean is there any response to that?

10 MS. MINSON: Just that, the response was at
11 that point there was a breach and at that point they had
12 been making, they had been in discussions with -- the
13 payments that he refers to, the \$7500 payments that Mr.
14 Riso refers to were going directly to the Cadle Company.

15 THE COURT: To honor, to comply with his
16 obligations under the agreement. That's what he says.

17 MR. MINSON: No, our position --

18 MS. ORTIZ: He wouldn't --

19 MR. MINSON: -- is that he was doing it under
20 the guise of the new agreement that they were
21 negotiating.

22 THE COURT: There wasn't one. The date is
23 different.

24 MR. MINSON: There wasn't one at that time.

25 THE COURT: No. There wasn't. There's no way.

JOHN S. MAZELLA

17

1 There wasn't.

2 MR. MINSON: I do see the --

3 THE COURT: I mean it just stares you right in
4 the face. The other one is from October. This is
5 September. And he's filing it, he's obviously filing
6 this affirmation because at that point they were not in
7 agreement. There is no reason to file it. He could have
8 said we're in the middle of settlement discussions,
9 Judge, put this off. That's not what he says. He's
10 basically arguing the merits of this order to show cause.

11 MR. MINSON: I do see the Court's position,
12 Your Honor.

13 THE COURT: So I just -- and again the
14 memorandum doesn't, the memorandum in support of the
15 cross motion and in opposition to Mazella's summary
16 judgment motion doesn't even address the statute of
17 limitations revival case law that I referred to back in
18 June, the leading case being Roth v. Michelson 55 N.Y. 2d
19 278, 449 N.Y.S. 2d 159, 161 (1982) which -- see also, In
20 Re: Dreier, LLP, 421 B.R. 60 at 63 (Bankr. S.D.N.Y. 20 09)
21 where Judge Bernstein quotes the Michelson case, where he
22 says, "There's a longstanding common law rule that a part
23 payment" -- part payment, \$7500 a month -- "of a debt
24 otherwise outlawed by the statute of limitations is made
25 under circumstances from which a promise to honor the

JOHN S. MAZELLA

18

1 obligation may be inferred, it will be effected to make
2 the time limited for bringing an action, start anew from
3 the time of such payment."

4 And, you know, I would think that one could
5 infer that literally from the 7500, but I think that the
6 Riso affidavit makes it crystal clear when he says again
7 he's in fact reached a arrangement which he entered into
8 pursuant to his obligations to Dr. Mazella pursuant to
9 the agreement. And, you know, where he says later the
10 language I quoted, it just seems to me that he's saying
11 we're on board. He didn't have to say that, but that in
12 September of 2004 does -- you know, I think that's what
13 it does.

14 So to me the limitations period hasn't run on
15 the first one, the 2001 settlement. The bankruptcy
16 stipulation from June 28, 2001 and the counter
17 designation the -- Feldstein's 7056 statement
18 acknowledges that that agreement is an indemnification
19 agreement which it would have to, because that's what it
20 says in the agreement.

21 So I think the indemnification claim is --
22 that's the only defense to that obligation under that
23 agreement and there's no defense. So I'm going to grant
24 summary judgment on that one. There's no real defense to
25 it on the statute of limitations ground.

JOHN S. MAZELLA

19

1 I don't think, well I agree with you that the
2 ruling by the state court judge that Mr. Feldstein the
3 primary obligor under that agreement, that 2001
4 agreement, I don't think that is binding on Mr.
5 Feldstein. I'm not sure it matters based on the fact
6 that there's no statute of limitations defense to it
7 because you're looking to enforce it as an indemnity.

8 MS. ORTIZ: Yes.

9 THE COURT: I don't think it's argued that the
10 later on supercedes that agreement. In fact it's argued
11 to the contrary that it's a separate agreement because
12 it's with Cadle as well as Mazella being a part of the
13 action.

14 But I guess we should turn to whether the, I
15 mean there are three causes of action in the complaint.
16 I've just given you -- I've granted the summary judgment
17 motion on --

18 MS. ORTIZ: Well one of them was breach of
19 contract, Your Honor, which --

20 THE COURT: Right.

21 MS. ORTIZ: -- we would withdraw at this point.
22 It doesn't make --

23 THE COURT: Well I've given you, well --

24 MS. ORTIZ: I shouldn't say that. I shouldn't
25 have said that --

JOHN S. MAZELLA

20

1 THE COURT: No, there's --

2 MS. ORTIZ: No, I'm sorry.

3 THE COURT: No there's no reason to withdraw
4 that.

5 MS. ORTIZ: I'm sorry, I'm sorry about that.

6 MR. MINSON: Okay.

7 THE COURT: No, I don't think you meant to say
8 that. That was just a brain freeze.

9 MS. ORTIZ: I said -- I should have the unjust
10 enrichment.

11 THE COURT: Unjust enrichment would not apply.

12 MS. ORTIZ: Unjust enrichment, Your Honor. And
13 I think the first one was just declaratory judgment.

14 THE COURT: Right. That is the primary
15 obligor. I don't know if you're pursuing that, I --

16 MS. ORTIZ: I don't think we have to.

17 THE COURT: Clearly the second one and the
18 third one would be, you know, you'd get summary judgment
19 on because the only defense --

20 MR. MINSON: The second and fourth?

21 THE COURT: No, the second and third. There's
22 the indemnification is the second --

23 MS. ORTIZ: Well third is unjust --

24 THE COURT: Oh, I'm sorry, the second and
25 fourth. You're right.

JOHN S. MAZELLA

21

1 MR. MINSON: Second and fourth.

2 MS. ORTIZ: Second and fourth.

3 THE COURT: Second and fourth, I'm sorry,
4 you're right, you're right.

5 There would be no reason to grant the third one
6 anyway because the contracts --

7 MS. ORTIZ: Yes.

8 THE COURT: -- that cover this --

9 MS. ORTIZ: Yes, Your Honor.

10 THE COURT: But in any event you're withdrawing
11 that one.

12 But on the second one, indemnification the only
13 defense to that was statute of limitations on the 2001
14 stipulation and I've ruled on that.

15 And on the third, again, the only defense to
16 that is the statute of limitations.

17 MR. MINSON: Statute of limitations.

18 THE COURT: So I've ruled on that.

19 It does appear to me that the 2004 settlement
20 does make Mr. Feldstein the primary obligor. The only
21 right under that settlement, this is again the October
22 14, 2004 settlement, the only right that Cadle has to go
23 against Dr. Mazella under that settlement is if Mr.
24 Feldstein is not making timely payments.

25 MS. ORTIZ: Yes.

JOHN S. MAZELLA

22

1 THE COURT: And that's set forth in a couple of
2 places; paragraph 5 --

3 MS. ORTIZ: Yes.

4 THE COURT: -- sets forth the default
5 mechanism, and then it ties into paragraph 8 which is
6 really the key paragraph which says, "Cadle agrees that
7 it shall not act in any way to enforce the judgment it
8 holds against Mazella during the time that Feldstein is
9 making timely payments as set forth above. Cadle shall
10 be entitled to enforce it's judgment against Mazella in
11 the event that Feldstein defaults and fails to cure the
12 same."

13 They've done that. I mean Feldstein did
14 default, but that -- those two paragraphs combined make
15 Feldstein the primary obligor. It's not -- this isn't an
16 indemnification.

17 MS. ORTIZ: I'm sorry, I didn't hear you.

18 THE COURT: This agreement, the October 2004
19 agreement, is not an indemnity agreement.

20 MS. ORTIZ: Yes.

21 THE COURT: But he's the primary obligor under
22 that agreement.

23 MS. ORTIZ: Yes.

24 THE COURT: So I'm -- unless I'm missing
25 something that's the plain language of the parties, that

JOHN S. MAZELLA

23

1 I would -- I would grant summary judgment on that point
2 with regard to Count I. I don't think I'm prepared to do
3 it as to the 2001 stipulation as to Count I. I know that
4 that was the logic in -- make sure I have her name right
5 -- Justice Shafer's --

6 MS. ORTIZ: Yes.

7 THE COURT: -- order, but it was really kind
8 of, it was really in the context of -- well first of all
9 Feldstein was not a party to, at that point to the
10 litigation.

11 MS. ORTIZ: Yes.

12 THE COURT: So it's not binding as a matter of
13 collateral estoppel or res judicata.

14 MS. ORTIZ: Right.

15 THE COURT: And it was in essence to get
16 Feldstein, to delay the litigation until the Feldstein
17 issue could be decided as far as joinder. And I think
18 that, frankly my reading of the settlement agreement is
19 ambiguous as to whether they're the primary obligor under
20 that settlement agreement. It's clearly an
21 indemnification agreement?

22 MS. ORTIZ: Yes.

23 THE COURT: But I, I would -- I think it's
24 irrelevant frankly because you're looking simply to
25 enforce your indemnification claim --

JOHN S. MAZELLA

24

1 MS. ORTIZ: Yes.

2 THE COURT: -- against him. But I'm not
3 prepared on a summary judgment basis to find that he's
4 the primary obligor under it. I'd like to get more of a
5 context of how was, what was intended.

6 MS. ORTIZ: I understand, Your Honor.

7 THE COURT: Okay.

8 MR. MINSON: So just to clarify, the summary
9 judgment on indemnification and breach of contract --

10 THE COURT: Right.

11 MR. MINSON: -- as to --

12 THE COURT: As to both agreements.

13 MR. MINSON: -- 2001 and 2004 --

14 THE COURT: Well 2004 there's no issue.

15 MR. MINSON: Yeah. And as to -- yes, you're
16 correct.

17 THE COURT: Summary judgment in your favor as
18 to Count 3 -- or actually it's withdrawn.

19 MR. MINSON: And the summary judgment as to the
20 2004 agreement as --

21 THE COURT: That's to Count 1.

22 MR. MINSON: -- to Count 1 being the primary
23 obligor.

24 THE COURT: Right. Right.

25 MS. ORTIZ: And 3 is withdrawn.

JOHN S. MAZELLA

25

1 THE COURT: We went through this fairly quickly
2 but I think it's a fairly simple analysis, and I don't
3 have to give you the standards on summary judgment. This
4 clearly fits within the summary judgment rubric. There
5 are no disputed facts on this issue. I've read the
6 sections of the 756 statements that refer me back to Mr.
7 Roth's declaration. There's no facts saying that that
8 declaration was somehow wrong or incorrect or whatever so
9 it speaks for itself.

10 To me it is clear from that declaration that
11 under the -- consistent with the Roth v. Michelson case
12 as of September 2004 Mr. Feldstein through his counsel,
13 who was filing the declaration on his behalf, was making
14 it clear that he continued to promise to honor that
15 obligation notwithstanding the earlier default in 2003.
16 The obligation being the 2001 bankruptcy stipulation.

17 MS. ORTIZ: And may I just note one thing for
18 the record, Your Honor. It is that we also did a cert
19 that says that payments were tendered through '05 and
20 went into '05.

21 THE COURT: Well, yeah.

22 MS. ORTIZ: It wasn't just as '04, it went into
23 '05 and payments were made through '05.

24 THE COURT: Right.

25 MS. ORTIZ: So if there was any question about

JOHN S. MAZELLA

26

1 what month it --

2 THE COURT: No, they were --

3 MS. ORTIZ: -- was in 2004, it did go into
4 2005.

5 THE COURT: Right, but the post-dated checks
6 went through --

7 MS. ORTIZ: Yes, through 2004.

8 THE COURT: Right. But September 2004 the
9 case, the bankruptcy case was filed --

10 MS. ORTIZ: I think in June.

11 THE COURT: June 2010.

12 MS. ORTIZ: Yes.

13 THE COURT: So even from September, and that
14 would be sufficient. It was, it was filed June 1, 2010.
15 And 108(a)2 of the Bankruptcy Code provides for a two-
16 year extension --

17 MS. ORTIZ: Yes.

18 THE COURT: -- of the limitations period and
19 this adversary proceeding was filed well within that; it
20 was filed December 31, 2010.

21 MS. ORTIZ: 2010.

22 THE COURT: So it's seven months later. So the
23 adversary is timely.

24 I should have started this whole process, I
25 apologize for going back to it now, by noting that I had

JOHN S. MAZELLA

27

1 my Chapter 13 calendar yesterday.

2 MS. ORTIZ: Yes, Your Honor.

3 THE COURT: The Chapter 13 Trustee had a motion
4 on --

5 MS. ORTIZ: Yes, Your Honor.

6 THE COURT: -- to dismiss this case for failure
7 to perform plan payments.

8 MS. ORTIZ: Yes, Your Honor.

9 THE COURT: And I granted that motion although
10 I made it clear that I might reconsider it if there was
11 anything under the plan that had been performed by the
12 debtor and the debtor was going to catch up on the
13 payments.

14 But separate and apart from that, and I want to
15 get this out on the record, I do not believe under the
16 law in this circuit that my dismissal of the case, and
17 the order hasn't been entered yet because it was just
18 yesterday afternoon that I had the hearing, but the
19 dismissal of the case does not automatically result in
20 the requirement that I dismiss this adversary proceeding.

21 The courts have long held, including in the
22 Second Circuit, that the court has discretion under
23 Section 349 which specifically authorizes the bankruptcy
24 court to alter the normal effect of dismissal, which is
25 that it gets rid of everything in the bankruptcy case,

JOHN S. MAZELLA

28

1 and it's introduction says "unless the court for cause
2 orders otherwise." But the court has discretion to keep
3 jurisdiction over a pending adversary proceeding.

4 And in going through that discretionary
5 analysis the court is supposed to consider judicial
6 economy, fairness and convenience to the parties and the
7 degree of difficulty of the state law issues involved.

8 See generally In Re Porges, P-o-r-g-e-s, 44 F.
9 3d 159, 162 through 630 (2d Cir. 1995), as well as for
10 the factors, see in addition to that case, In re
11 Carraher, 971 F. 2d 327, 328 (9th Cir. 1992), In re
12 Morris, 950 F. 2d 1531, 1534 (11th Cir. 1992) -- I'm
13 sorry, 1535. And In re Roma Group, Inc., 137 B.R. 150,
14 151 (Bankr. S.D.N.Y. 1992), and In re Stardust Inn, Inc.,
15 70 B.R. 888, 890-891 (Bankr. E.D. PA 1987).

16 Here obviously I've, as you noted at the start
17 of this hearing Ms. Ortiz I've been presiding over this
18 litigation, had rulings on the motion to dismiss the
19 initial complaint, leave to amend that complaint, on
20 motion to dismiss the second amended complaint, this
21 summary judgment hearing had been scheduled for months.
22 I think there'd be a, you know, it's hard to find a
23 better case for continuing jurisdiction on grounds of
24 judicial economy, fairness and convenience to the parties
25 et cetera.

JOHN S. MAZELLA

29

1 As far as the state law issues it's really a
2 summary judgment, I mean it's pretty simple. So given
3 that fact --

4 MS. ORTIZ: Your Honor, may I just ask you for
5 clarification?

6 THE COURT: -- I will, I had concluded even
7 yesterday, but also today that I would keep jurisdiction
8 over this proceeding at least through the summary
9 judgment. If I denied summary judgment I would consider
10 sending it back to state court, but I don't see a basis
11 for that here.

12 MS. ORTIZ: May I just ask you for some
13 clarification, Your Honor?

14 THE COURT: Sure.

15 MS. ORTIZ: Mr. Malera (ph) informed me that I
16 should contact Ms. Cava (ph) that you had dismissed the
17 case but that --

18 THE COURT: Right.

19 MS. ORTIZ: -- I should try to speak to her
20 about --

21 THE COURT: Only if there was something besides
22 this litigation that you wanted to deal with in the case.
23 If there was a Chapter 13 plan issue that I was missing
24 -- the way he phrased it at the hearing was, Ms. Ortiz
25 asked that it not be dismissed because we have summary

JOHN S. MAZELLA

30

1 judgment on tomorrow. And, you know, Porges deals with
2 that.

3 MS. ORTIZ: I understand now.

4 THE COURT: And, so, if that was the only
5 factor I was going to dismiss the case because he hadn't
6 made his payments, and I would deal with this litigation
7 as I, you know, as has transpired today. Or if I denied
8 summary judgment, I might have sent it back.

9 But if there was something else, for example, I
10 don't recall -- for example if you had gotten a Pond
11 motion and stripped off a second lien which only works in
12 a bankruptcy -- if there were any things like that where
13 a Chapter 13 plan was important, I'd give you a chance to
14 cure the default and so would the Trustee, and I would --
15 she would pull, frankly, she would pull --

16 MS. ORTIZ: Okay.

17 THE COURT: -- that or adjourn her motion to
18 dismiss.

19 MS. ORTIZ: The only reason why it's important,
20 Your Honor, is that the Cadle Company is extremely
21 aggressive in its collection against the debtor.

22 THE COURT: Well then he needs to make his plan
23 payments. Then he should make his plan --

24 MS. ORTIZ: And he will.

25 THE COURT: -- payments by Monday. Because

JOHN S. MAZELLA

31

1 otherwise -- or today even or tomorrow because otherwise
2 she's going to submit the order. If he makes the plan
3 payments she's not going to submit it.

4 MS. ORTIZ: Okay. That was my question.

5 THE COURT: Okay.

6 MS. ORTIZ: That was my question. All right.

7 THE COURT: All right.

8 MS. ORTIZ: Thank you very much, Your Honor.

9 THE COURT: But that, the only reason he gave
10 was that we had summary judgment, but I've given you the
11 case law on that so I didn't need to keep the Chapter 13
12 in place for that --

13 MS. ORTIZ: I see, Your Honor.

14 THE COURT: -- for that purpose.

15 MS. ORTIZ: All right. Well thank you very
16 much, Your Honor. I will straighten that out.

17 THE COURT: Okay. So I'm going to look for an
18 order from counsel for the debtor/plaintiff, it should
19 put in it that the unjust enrichment cause of action is
20 withdrawn.

21 MS. ORTIZ: Yes.

22 THE COURT: And grants summary judgment on the
23 other three, and denies summary judgment on the other
24 three -- the cross motion for summary judgment on the
25 other three, except and respective -- unless, maybe

JOHN S. MAZELLA

32

1 you're going to withdraw that too, the request for
2 declaratory judgment that the 2001 stipulation is one of
3 primary obligation.

4 MS. ORTIZ: Thank you very much, Your Honor.

5 MR. MINSON: Okay. Thank you very much, Your
6 Honor.

7 THE COURT: I mean I'm assuming that you're
8 not, I'm assuming this is over at this point. I mean
9 there are appeal rights but --

10 MS. ORTIZ: It's not over for John Mazella
11 until he pays off the --

12 THE COURT: No, no, I'm not talking about this
13 adversary proceeding.

14 MS. ORTIZ: I hope so, Your Honor.

15 THE COURT: No, no, you're not -- I'm not being
16 clear. I didn't grant you summary judgment on a little
17 portion of your motion.

18 MS. ORTIZ: I understand.

19 THE COURT: I don't know if you're going to be
20 asking for a trial on that or not or whether you're
21 satisfied with the rulings in the way that declaratory
22 judgment request was sort of an alternative request as to
23 the 2001.

24 MS. ORTIZ: No, I'm satisfied with the ruling.

25 THE COURT: All right. Fine. So then I think

JOHN S. MAZELLA

33

1 you should say the adversaries are closed.

2 MS. ORTIZ: Okay.

3 THE COURT: I mean you should provide for the
4 closing of the adversary.

5 MS. ORTIZ: All right. Thank you very much.

6 THE COURT: Okay.

7 MR. MINSON: Thank you, Your Honor.

8 THE COURT: Thank you.

9 *** (Whereupon the matter concluded) ***

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I N D E X

PAGE

Motion for Summary Judgment (Adversary
Proceeding 10-08455) -

Count I - statute of limitations - granted 18

Count II - indemnification - granted 21

Count III - unjust enrichment - withdrawn 21

Count IV - breach of contract - granted 21

Cross Motion for Summary Judgment (Adversary
Proceeding 10-08455) - denied except for
declaratory judgment 32

CERTIFICATION

I, Nancy B. Gardelli, certify that the foregoing transcript is correct, to the best of my ability, from the official electronic sound recording of the proceedings in the above-entitled matter.



Nancy B. Gardelli, Notary Public
Commission expires: 6/28/15
Acorn Transcriptions, Inc.
www.acornfla.com

Date: February 7, 2014